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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 03.07.2019

Judgment Pronounced on : 08.11.2019

CORAM :

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.144 of 2006
and CMP.No.3786 of 2006

1.Nakkeeran
2.Shanmugam Gurukkal
3.Kumar
4.Kanchana Appellants / Respondents/Defendants

Vs

Arulmighu Nethirodharagesuwarar Thirukovil
Panayapuram
Rep. by its Executive Officer, S.Gunasekaran
. . . . Respondent / Appellant / Plaintiff

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree dated 07.03.2005 made in A.S.No.168/2003 on the file of the Court of II Additional Sub Judge, Villupuram, reversing the judgment and decree dated 10.03.2003 made in O.S.No.525/1999 on the file of the Court of Additional District Munsif, Villupuram.

For Appellants : Mr.T.P.Manoharan, Senior Counsel
Assisted by Mr.K.P.Jotheeswaran

For Respondent : Mr.N.Sathyamoorthy

JUDGMENT

1.1 The plaintiff had laid a suit in O.S.No.525 of 1999 for declaration of title and recovery of property, and for setting aside the decree passed in O.S.No.67/1997. The suit was dismissed by the trial court. The plaintiff, hence preferred A.S.No.168 of 2003 before the first appellate Court and the said appeal came to be allowed. Aggrieved by the same, the defendants have approached this Court in the second appeal.



1.2 Parties would be referred to by their rank before the trial Court. During the pendency of the suit, the first plaintiff died, and his legal representatives were impleaded.

2. The facts on which the plaintiff rests the cause of action for the suit are:

- The suit property measures 1.24 acres, and it is stated to be an agricultural property. This property originally belonged to a certain Swaminatha Gurukkal, whose adopted son is Annaswamy Gurukkal, and the suit property came to the hands of Annasamy Gurukkal under the Will executed by Swaminatha Gurukkal dated 15.12.1997 (Ext.A1). While so, on 05.04.1914, under Ext.A2, Annasamy Gurukkal had declared his intention to create a religious charity in favour of the deity of the plaintiff-temple, and had dedicated the suit property to the deity.
- While so, Annasamy Gurukkal's son, who is arrayed as the first defendant in the present suit, has laid a suit in O.S.No.67 of 1997 against the plaintiff herein, for declaration of his title over the suit property and for consequential decree of injunction. He primarily alleged that Ext.A-2 had not taken effect. This suit was decreed ex parte, and has become final. The plaintiff came to know of the suit in the circumstances stated below.
- Till 1995, the suit property was under the administration of the Board of trustees of the plaintiff temple. While so, in 1995, the first defendant trespassed into the suit property, and attempted to sell it to strangers. Hence, the plaintiff issued Ext.A-3 notice, dated 20-05-1996, to the first defendant. To this, the first defendant had issued two reply notices both through his counsel, are respectively dated 03-06-1996 and 19-08-1996. These replies are marked as Ext.A-5 and A-6, and through them he conveyed that he asserts title to the suit property. Refuting it, the plaintiff issued another notice dated 21-07-1998 (Ext.A-7) to the defendants 1 and 2, claiming damages for the illegal occupation of the property, and to hand over the suit property. The first defendant refused to receive it, and returned the same. But, the second respondent had received the said notice and the acknowledgement receipt was marked as Ext.A9.
- While so, the first defendant had filed a caveat (marked Ext.A-11) through his Advocate R.Anbarasan. It was in this Ext.A-11 caveat, the first defendant had disclosed about an exparte decree that he had obtained in O.S.67/1997 on the file of District Munisff Court, Villupuram.



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Hence, the plaintiff issued Ext.A-12, notice dated 29-07-1998, to the first defendant herein, with a copy marked to Thiru. Anbarasan, the Advocate of the first defendant, wherein the plaintiff had made a request to provide him with a copy of the judgement and the decree in O.S.67/1997. Curiously, both the notices issued to the first defendant and his counsel were returned unserved. While the postal endorsement on the cover addressed to the first defendant read 'No such addressee', the one attempted to be served on his counsel returned with the endorsement, 'Addressee not known'. It is now apparent, that the first defendant had given a false address in the caveat.

- Only the second defendant herein, responded to the notice issued by the plaintiff with his Ext.A-10 reply dated 29-07-1998. In his reply, he disclosed about an agreement of sale dated 22-11-1995, that he had entered into with the first defendant, and also raised other untenable contentions. This reply also disclosed about O.S.67/1997, the suit which the first defendant had laid against the temple, for declaration of his title over the suit property, and about the exparte decree dated 28-08-1997, passed therein.
- Contending that in O.S.67 of 1997, no summons was duly served on the Executive Officer of the plaintiff temple, and that the ex parte decree had been fraudulently obtained, and that it does not bind the plaintiff, the present suit is laid seeking a set of reliefs as indicated above. This includes the prayer to set aside the ex parte decree passed in O.S.No.67/1997 as well.

3. The appellants (defendants 2,4,5 &7) herein, inter alia have taken up the following defence:

- a) That the ex parte decree passed in O.S.No.67/1997 (Ext.B4) has become final, and that it would operate as res judicata in the present suit. If at all the plaintiff feels aggrieved, then it ought have only approached the Court for setting aside the ex parte decree, and it cannot maintain a fresh suit for the said purpose.
- b) Ext.A2, the settlement deed under which the first defendant's father Annasamy Gurukkal had created the trust, had never taken effect, or come into operation.

4.1 When the suit went to trial, the Executive Officer of the plaintiff was examined as P.W.1. The bailiff who was deputed in O.S.67/1997 to serve summons on the present plaintiff was examined as P.W.2. (In strict sense, he should have been



examined only as a Court witness). For the defendants, the 2nd defendant was examined as D.W.1. The critical documents that were relied on by rival sides have already been introduced in the facts-narration above. The other documents are the plaint in O.S.67/1997, the copy of the unserved summons and the notice in that suit, all of which are marked Exts.A-15 to A-18 and A-22. One of the significant limb of plaintiff's contention before the trial court was that the witness who had signed the statement/endorsement of the bailiff in the copy of the summons issued in O.S.67/1997 was the first defendant himself. To repeat, he is the plaintiff in that suit.

4.2 The trial Court dismissed the suit. And, its reasoning is:

- The plaintiff has failed to prove that Ext.A-2 document (the document dedicating the suit property to the temple) had not come into force.
- A comparison of the admitted signatures of the first defendant with Ext.A-21, (the purported signature of the first defendant in the summons) disclose that the one in Ext.A-21 is not proved to have the signature of the first defendant, and consequently, it did not enable the plaintiff to prove that the decree in O.S.67/1997 was fraudulent. Further the pleading on fraud in the plaint was not in terms of Order VI Rule 4 CPC.
- The plaintiff, ought to have moved the trial Court that passed the ex parte decree in O.S.67/1997 for setting aside the same. Despite the receipt of Ext.A-11 caveat petition, wherein the ex parte decree passed was disclosed, the plaintiff had chosen not to move the Court to set aside the exparte decree passed in O.S.67 of 1997.
- The present suit is barred by res judicata.

5. In a first appeal preferred by the plaintiff, the decree of the trial Court was reversed, and the suit was decreed. The aspects that weighed with the first appellate Court are:

- That Ext.A-2 (the deed of settlement by which the trust was constituted in 1914), under which the suit property came to be dedicated to the deity of the plaintiff temple had taken effect, and this was proved by Exts.A-26 and 27, which respectively are copies of Chitta for the fasli 1388 to 1394, and Adangal for the 1390-1405 respectively. (They correspond to 1978-1979 to 1984-1985 and up to 1995-1996). Further Ext.B-9 shows that the patta that stood in the name of the plaintiff, was seen transferred in the name of the first defendant only on 11.05.1998, and, only after the decree in O.S.67/1997 (which came to be 28.08.1997).



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- There is no service of summons in O.S.67/1997, and whatever that was attempted to served was tainted in fraud, and hence the suit for setting aside the ex parte decree is maintainable.

- Where a decree is fraudulently obtained, the doctrine of res judicata does not operate.

. This appeal was admitted on the following substantial questions of law :

- 1) Whether in view of the judgment and decree made in O.S.No.67 of 1997 (Ext.B4 & B5) between the deceased first defendant and the respondent herein, the present suit filed by the respondent against the deceased first defendant in respect of the same property, is not barred by doctrine of res judicata?
- 2) Whether inspite of the failure of the respondent/plaintiff to prove that in execution of Ex.A2, the possession of the suit property was delivered to it at once, can the said deed be treated as complete and acted upon by making mere reference to its registration alone?

Arguments:

7.1 The learned counsel for the appellants (defendants 2,4,5 &7) argued:

- There is no proof that pursuant to Ext.A-2, the administrators/trustees of the plaintiff temple had taken possession of the property. This stands proved by the testimony of P.W.1, who would depose that he came to know of this document only in 1996, some 82 years after the execution of Ext.A2. The finding of the first appellate Court is therefore, fundamentally wrong.
- Where a person is aggrieved by the passing of an ex parte decree for want of due service of summons on him, the remedies open to him are: (a) To move the Court that passed the decree under Order IX Rule, or to for review of the said decree; and (b) to prefer an appeal. Reliance was placed on the authority of the Hon'ble Supreme Court in Bhanu Kumar Jain Vs Archana Kumar & another [(2005)1 SCC 787]. Inasmuch as the present plaintiff is a party-defendant in O.S.No.67 of 1997, he ought to have adopted any one of these modes available to him in law, and it is not given to the plaintiff to institute a fresh suit to set aside an ex parte decree. Reliance was placed on the authorities in Neerja Realtors Private Limited Vs. Janglu [(2018) 2 SCC 649] and Bhanu Kumar Jain Vs Archana Kumar &



Another [(2005)1 SCC 787].

- That Ext.B4, the decree passed in O.S.67/1997 operates as res judicata and hence Courts are barred from revisiting the said issue again in this suit.

He added that, nowhere is there a proof that the plaintiff had enjoyed the property. Even if it had enjoyed any such property, by virtue of the first leg of the argument founded on the right of the plaintiff to maintain the suit, any contra opinion/reason available to the plaintiff was lost to it.

8.1 Per Contra, the learned counsel for the plaintiff/respondent argued that when in 1914, under Ext.A-2, a trust was created by dedicating the suit property to the deity, the property vests in the deity instantly. The document declares that the property dedicated (suit property) belongs to the deity, and stipulates that sale of, or creation of any mortgage over, the suit property are barred. Under the doctrine of parens patriae, responsibility vests with the Court to protect the interest of all those whose interest they themselves could not protect. And, this list does not stop with minors, or mentally ill persons, but also includes a deity which though a juristic person, depends on those who govern its affairs to protect its interest. Where trustees err or mismanage, then the Court should step in to protect the interest of the deity.

7.2 Turning to the impugned decree passed in O.S.67/1997 is concerned, that was passed without any due service of summon of the suit on the defendant in that suit (the plaintiff in the present suit), and this is proved by P.W.2, the bailiff in the earlier suit. What had provided a worsening effect to the consequence that might flow from the testimony of P.W.2, is that the trial Court in O.S.67 of 1997 did not even choose to order substituted service of notice under Order V Rule 20 CPC. Where an ex parte decree is passed without due service of notice, then the very decree is non est in law, and if it is obtained by a party's fraud, then a suit for setting aside the decree is maintainable.

Discussion & Decision

9.1 There are two aspects in relation to which the substantial questions have been framed for consideration: (a) If Ext A-2 deed had taken effect, or to be precise if proof that possession of the property dedicated under Ext.A-2 is a mandatory indicator to prove that it had taken effect; and (b) If Ext.A-18, ex parte decree will operate as res judicata. (Here, it requires to be mentioned that

the substantial question framed does not specifically touch upon the maintainability of the suit per se).



9.2 During the hearing, however, the point the stress was more on the maintainability of the suit. Since it involves a critical question of law, and since finding on it will have an impact on the question raised, this court has decided to consider it.

10. The issue if possession has been taken on behalf of the deity pursuant to Ext.A-2 is concerned, it is chiefly a question of fact, and it may assume a substantial question within the meaning of Sec.100 CPC, if the finding on it as entered by the first appellate court is perverse. Where a finding on fact, even if it is a plausible one, but can be justified on a fair appreciation of evidence, the same would be entitled to be sustained. Viewed thus, this Court finds that the appellants/defendants appeared to have entertained a conceptual fallacy in approaching the issue, in resting the premise for the same on a need for acceptance of settlement under Ext.A-2, and actual taking of possession pursuant thereto. This can be approached as below:

- Under Ext.A-2, the suit property is dedicated to the deity. The deity, though a juristic person does not have all the faculties of a natural person, and it is incapable of holding possession except through the human agency that manages its affairs. Therefore, some act by which the trustees, or managers indicate that some rights of ownership are exercised over the property dedicated, will be adequate to conclude that the declaration of a dedication of the property under Ext.A-2 has taken effect. If Ext.A-2 is carefully read, it makes a declaration that the suit property is dedicated to the deity.
- There is a conceptual difference between a gift inter vivos with which the Transfer of Property is concerned, and a religious dedication. When dedication is made for a public or a religious charity, subject to the terms of dedication, it instantly takes effect. It does not require an acceptance as in sec.122 of the transfer of Property Act. In Indian jurisprudence, a declaration in favour of a religious or a public charity, does not even require a written document to create it. Once, a dedication through declaration of an intent to dedicate is made unequivocally, subject to the terms of dedication, (and the authority of the trustees to alienate the property with or without the permission of the Court, as the case may be) the religious or a public charitable trust can only be extinguished for the loss of its objective, but even there the doctrine of cyprer will take over to deal with the property. Contextually, in this case, a declaration was made under



Ext.A-2 in 1914, and the deity is still available to sustain the dedication.

This point is therefore decided against the defendants/appellants.

- Secondly, by virtue of the declaration made in Ext.A-2, the deity has become the owner of the suit property, and inasmuch as the suit property is a vacant land, law presumes possession in favour of the title holder. But Exts.A-23, Ext.A-24 and Ext.A-25 further indicate that the plaintiff has not chosen to fall back on any legal presumption, but stand firmly on the revenue records, which are some 20 years prior to the suit to establish that the revenue records of the suit property indeed were in the name of the deity/temple. If the combined effect that flows out of this is now contrasted with the evidence of P.W.1, on which the defendants/appellants rely on, it appears too weak to upset the title of the deity over the suit property. P.W.1, after all, was only the Executive Officer of the temple at the relevant time, and he speaks to his personal knowledge merely.

11. The point critical to the decision in this appeal is whether Ext.A-18 = Ext.B-4, the decree passed in O.S.67/1997, is a fraudulent decree? And, to take it to the next level, is it a decree that law recognises as a decree? In otherwords, it is not just about whether it was an exparte decree, and what legal avenues were available for the defendant in that suit to deal with that, but is about ascertaining the legal effect of the very decree.

12. In KERR on the Law of Fraud and Mistake [in 7th Edition] at page 416, the learned author states:

A judgment or decree obtained by fraud upon a Court does not bind such Court or any other, and its nullity upon this ground, though it has not been set aside or reversed, before the Judicature Acts could be alleged in a collateral proceeding "Fraud", said De Grey G.J., "is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal". In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud, discovered after the judgment....."



13.1 Fraud has its genesis in deception and masquerades with the face of the innocent, and depends for its proof, the circumstance in which it is set. A logical sequence is decipherable in, what might present itself as, few bits and pieces evidence, each well cohering with the other, sapping and draining the right of another. What fairness cannot accommodate, a scheme at manipulation assures.

13.2 In ascertaining if the decree in O.S.67 of 1997 was a fraudulent decree, the commencing point is, Ext. A.15, the copy of the plaint in O.S.67/1997. The first defendant herein is the plaintiff in that suit. It was laid against, "The Executive Officer, Arulmighu Nethirathatreswaraswamy Thirukoil, Panayapuram." The suit was laid on 01-04-1997. The other facts relevant are:

- The certified copy of the summons in that suit is marked Ext.A-16 and original thereof was marked Ext.A-22. It was not served on the defendant, the executive Officer of the temple. And, the bailiff's endorsement reads that he could not find the defendant (namely, the Executive Officer of the temple), and on enquiry he came to know that he was not seen to be coming to the village for over six months. And the witness to this endorsement is Sambanthamoorthi Gurukkal son of Annasamy Gurukukkal, who according to P.W.1 was the very plaintiff in that suit. This part of the testimony was not cross examined.
- And there is no case that P.W.2, the bailiff had attempted to serve summons by affixture in terms of Order V Rule 17 CPC. Nor is there a case, the Court had ever attempted to serve the summons on the defendants by substituted service within the meaning of Order V Rule 20 CPC.
- P.W.2, the Junior bailiff (who was assigned the duty to serve the summons issued in O.S.67 of 1997 on the Executive Officer of the temple), speaks to the endorsement he has made in the summons. In his cross examination, it was suggested to him that the purported signature of Sambanthamoorthi in the summons was not that of the plaintiff (in that suit).
- During the pendency of the present suit, the first defendant Sambanthamoorthi Gurukkal had died, and none of his heirs who had been impleaded were examined on the side of the defendants to speak to the identity of the witness to the endorsement of the bailiff.

It is irrefutably evident that Ext.A-18 = Ext.B-4 decree has been passed without service of summons of any kind, including



the one provided under Order V Rule 17 CPC.

14.1 An attempt was made to serve summons on the Executive Officer of the temple, which even according to D.W.1, is about 400 years old, and is a famous temple in the locality. If the sequence is observed, why had not P.W.2 attempted to serve the summons at the temple? If the Executive Officer is not available at the temple, assuming the bailiff had gone to the temple, why had he not tried to serve it by affixture in any conspicuous place in the temple as required in Order V Rule 17 CPC? Is it not shocking that the very plaintiff ought to certify about the non-availability of the Executive Officer of the temple? It is unfortunate that a ministerial staff of the Court (the bailiff), should be a party to this episode. And, this Court could not persuade itself to believe that this bailiff could have acted innocently, since there is hardly any justification for him not even to visit the temple, ignore those procedure that law CPC provides for service of summons, and then to require the plaintiff himself to attest his inadequate efforts to serve the summons on the Executive Officer of the temple concerned.

14.2 It is not that the trial court was without alternate options. If only the Court were vigilant enough to order summons by substituted service under Order V Rule 20 CPC, a situation that has now visited this Court could have been averted. The scheme of CPC imposes an inviolable obligation, not on the party, but on the Court to inform the party, against who an action is laid before it. The failure of the Court to follow Order V Rule 20 CPC is a self negation of the last opportunity that it had in ensuring service of summons.

15. In Sushil Kumar Sabharwal Vs. Gurpreet Singh and Others [AIR 2002 SC 2370], the Hon'ble Apex Court has declared:

"8. We find several infirmities and lapses on the part of the process-server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement



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is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process-server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt.....

12. The provision contained in O.9 R.6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are : (i) when summons duly served; (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on it by O.9, R.6 of the C.P.C., the case would not have proceeded ex parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.



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13. Be that as it may, we are satisfied that the summons was not served on the defendant-appellant. He did not have an opportunity of appearing in the trial Court and contesting the suit on merits. The trial Court and the High Court have committed a serious error of law resulting in failure of justice by refusing to set aside the ex parte decree."

In Yallawwa Vs Shantavva [(1997) 11 SCC 159], a case instituted for dissolution of marriage, notice was served on an illiterate woman through substituted service, dispensing with all the efforts to serve notice under Order V Rules 12, 15 & 17, the Hon'ble Supreme Court has held that it was no service, and that the decree passed therein is a nullity.

Sri Krishna Rice Mills Vs. Rajagopala [AIR 1958 Madras 522], is a case where summons was sought to be served through registered post, but was refused, and there was no attempt to serve summons by affixture as per Order V Rule 17 CPC, and this Court has held there is no valid service of summons.

In Universal Machinery Co. V.Vinag Mining Co., [AIR 1981 Karnataka 249], it is held :

"Where on account of mistake of officer of Court, summons was not properly addressed to defendant but addressed to wrong person and no copy of plaint was enclosed with it, with the result that he had no notice of it and in spite of a letter addressed to Court by him, without verifying whether summons was properly served an ex parte decree was passed against him, the Judge had not only power to set aside such a decree but it was also his bounden duty to do so. Decree passed against defendant against whom suit summons was not served in the eye of law becomes a nullity...".

The cumulative effect the ratio that the aforesaid pronouncements of the Hon'ble Supreme Court or the High courts, as the case may be, is to the effect that summons in O.S.67/1997 was not duly served. But where a summon is not duly served by itself may not render the exparte decree passed as fraudulent. It requires an act of fraud to accompany it. This is best explained in Bhojai Vs Salim Ullah [AIR 1967 Allahabad 221] :

"9.It is well settled that when there is a deliberate suppression of summons or notice issued to a person on a false report relating to service of summons or notice upon him is secured



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from the process-server, and the Court is thus led to pass an ex parte decree or order against such person without his acquiring knowledge of the suit or proceeding against him, the decree or order must be regarded as vitiated by fraud. This is particularly so when the suppression of the summons or notice or the securing of a false report of service from the process server, is found to be part of a larger plan of deceit which has for its object something more than merely obtaining an ex parte decree or order."

In *Girish Chandra Jana Vs. Kalachand Maity* [AIR 1957 Calcutta 242], the Court held :

(4) It is a settled law that where the fraud alleged is of such kind as to attack the suit itself and not merely the regularity or sufficiency of the service or the proceedings, a suit by a person on whom no summons was served, for setting aside the ex parte decree is maintainable. It is also settled law that mere falsity of claim and/or perjured evidence if non-service of summons be not proved will not support the action. The plaintiff, therefore in a suit for setting aside an ex parte decree on the ground of fraud when he was unsuccessful in his application for setting aside the ex parte decree on the ground of non-service of summons must prove some kind of fraud, which affects the suit itself and not merely the regularity or sufficiency of the service or the proceedings, in addition to non-service of summons in order to obtain a decree. Falsity of claim would amount to such fraud, though, possibly, mere perjured evidence, unless the claim was false, would not. In order, therefore, that the plaintiff may succeed in the present suit, it is necessary to establish that the mortgage claim was false. On that point, the learned Munsif found against the plaintiff. The learned Subordinate Judge has not recorded any different conclusion. He has reversed the learned Munsiff's decision, dismissing the suit, and decreed the suit simply upon the finding that no summons was served upon the plaintiff in the mortgage suit and that it was fraudulently suppressed. That is not supportable in law and the learned Subordinate Judge's decision must, therefore, be set aside.



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(5) The appellant has contended that the rejection of the present plaintiff's application for setting aside the ex parte decree under O.9, R.13 of the Code of Civil Procedure upon the finding that the summons was duly served in the mortgage suit would operate as res judicata to bar the present suit. We do not think that that contention is sound in law. The Privy Council case of Khagendra Nath Mahata v. Pran Nath Roy, ILR 29 Cal.395; 29 Ind App 99 (PC) (A), concludes the appellant on this point. Here the fraud alleged included, inter alia, falsity of the claim which really attacked the suit itself and challenged it as a false suit. It was not confined to service of summons but was also extraneous to and independent of such service. It was not merely an attack on the regularity or sufficiency of the service or the proceedings but an attack on the whole suit as a fraud from beginning to end. There was no doubt allegations also of perjured evidence and fraudulent suppression of summons. But those were really treated as part of the main allegation of fraud that the claim, that is, the suit itself, was a false one, for which there was absolutely no foundation and on or in which a fraudulent ex parte decree was obtained. The O.9, R.13 proceeding again was decided merely on the finding that non-service of summons was not proved. The finding, that summons was served, does not, in our opinion, in the context in which it appears, mean anything more. The question of fraudulent suppression of summons or the falsity of the claim which might well have provided a motive for such suppression was not at all considered. In these circumstances, no question of res judicata arises in the present case. We, therefore, reject the appellant's plea in that behalf.

16. Before passing the decree, the trial court has ignored to ascertain if summons of any kind at all has been served. How can a decree, passed without the service of summons, could ever be termed a decree in law? Fairness is the fountain head of judicial process, and is an inseparable facet inbuilt in our jurisprudence. What lends credence to a judicial act, is its fairness, and when it is lost, the quality of the act done shakes the public confidence in the judicial system. The Procedure law which CPC embodies, is a rule book of fairness. Once the suit is entertained, at every stage of the litigation,



the Court is required to hear the other side. Ordering summons or notices is not a cosmetic act in procedure, but is the heartbeat of processual fairness. Therefore, when a decree is passed without even service of summons on the defendant, fairness that the judicial system owes to the defendant is seriously impacted. A decree passed with no opportunity to the one, who in law has a right to be heard, is no decree. It is not a procedural irregularity, but an act bypassing the procedure. Placed on this plane, Ext.A-18 = B-4 decree passed in O.S.67 of 1997 scans positive to be declared as no decree. Refer: Yallawwa Vs Shantavva [(1997) 11 SCC 159]

17.1 There is another angle by which Ext.A-18 can be tested. This about examining if it is a fraudulent decree. In order the decree passed in O.S.67 of 1997 must be considered fraudulent, there must be something more than mere non-service of summons on the defendant in that suit. Falsity of plaintiff's claim per se, can, in a given case, affect the decree passed therein. (See Girish Chandra Jana case, AIR 1957 Calcutta 242). It is the conversion-factor which may transform a decree passed under the shadow of procedural irregularity in service of summons, into a fraudulent decree.

18. The focus should now necessarily shift to ascertain if there had been an attempt made by the plaintiff in O.S.67/1997 to obtain a false decree based on a false claim. The relevant facts are:

- As already found that dedication under Ext.A-2 had been complete and that the temple has been enjoying the property till 1995. The only document to show the possession of the first defendant herein is the patta which is post 1995, and not at any time prior to that.
- Even from 1995, the Executive Officer of the temple had issued repeated notices to the first and second defendant (see paragraph 2 above), which are prior to the institution of O.S.95/1997, which implies that the temple has asserted right over the suit property based on Ext.A-2 at the earliest possible opportunity.
- The first defendant, with no right whatsoever, has instituted the suit by suppressing the earlier notices.
- The conduct of the Executive Officer right through has been, even post the decree passed in O.S.67 of 1997 is to protect the suit property for the temple.

All the pieces of the jigsaw which required to prove the fraud in obtaining Ext.A-18 decree, now seen falling in place. And,



this fraud has served as the foundation of a further design to defeat the procedural process of serving summons on the Executive Officer of the plaintiff-temple. It is a plot within a plot.

19. To conclude this aspect, this Court holds that Ext.A-18 = Ext.B-4 decree passed in O.S.67/1997 is no decree, and even if it is presumed to be fair in procedure, still it has to fail as a fraudulent decree. Necessarily, one who is affected by any such decree has the right to maintain a separate suit to set it aside. It necessarily follows, that Ext.A-18 cannot operate as res judicata either.

20. In the result, the appeal is dismissed and the judgment and decree dated 07.03.2005 made in A.S.No.168/2003 on the file of the Court of II Additional Sub Judge, Villupuram, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(Audit)

//True Copy//

Sub Assistant Registrar

ds

To:

1.The II Additional Subordinate Judge
Villupuram.

2.The Additional District Munsif
Villupuram.

3.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.N.Sathya Moorthy, Advocate, S.R.No.93249

S.A.No.144 of 2006

BP(CO)
CB(31/08/2021)